Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Applications of	)	
	)	
AT&T, Inc. and DIRECTV	)	
For Consent to Assign or Transfer Control	)	MB Docket No. 14-90
Of Licenses and Authorizations	)	
	)	
To: The Commission	)	

COMMENTS OF THE

INDEPENDENT MULTIFAMILY COMMUNICATIONS COUNCIL (IMCC)

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REDACTED - FOR PUBLIC INSPECTION

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I. Introduction.

The Independent Multi-Family Communications Council ("IMCC") submits these Comments in response to the Public Notice released by the Commission on June 11, 2004 regarding the Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations in MB Docket No. 14-90. The proposed acquisition of DIRECTV by AT&T is referred to herein as the "Transaction".

IMCC is a trade organization that represents the interests of private cable operators ("PCOs", also referred to as satellite master antenna television providers), equipment manufacturers, program distributors and property ownership-management-development companies. Collectively, PCOs represent more than 2 million units of apartments, student housing, senior housing, condominiums, affordable housing, planned unit developments and military housing throughout the United States, and the market is growing. The PCO market exists because consumers want choice and PCOs offer an alternative to big cable and telephone companies to the approximately one-third of Americans who live in MDU properties. PCOs are in demand because they offer exceptional service and are specialists in MDU markets, and because PCOs are generally willing to provide these exceptional services in under-served markets, including low-income areas and senior housing, that larger companies do not view as attractive targets for investment.

PCOs employ a variety of telecommunications technologies, both wired and wireless, which are used to offer analog and digital video, voice and data communications services to consumers residing in residential multiple dwelling unit ("MDU") markets, including apartment communities, condominiums and single-family home developments across the country. With regard to video services, PCOs utilize dish antennas located on private property to receive video programming content from satellites owned or operated by either of the two existing direct broadcast satellite ("DBS") providers currently existing in the United States, Dish Network and DIRECTV. The DBS providers represent, along with telephone companies that recently entered the pay-television business, an important competitor to franchised cable operators, which remain the dominant players in all multi-channel video programming ("MVPD") markets. Because the DBS providers do not operate cable systems using public rights-of-way, both Dish Network and DIRECTV depend on PCOs to construct and operate satellite master antenna systems located entirely on private property, and to deliver the DBS companies' video content to MDU customers.

However, PCOs function not merely as distributors of DBS television programming. In addition, most PCOs sell high-speed Internet access to MDU residents, and many offer telecommunications services, including voice-over-IP as well. Typically, PCOs provide Internet services by leasing a property-specific data circuit from Internet backbone companies, such as

Level 3, Verizon or AT&T. As *bona fide* triple-play providers, PCOs compete with other full-service carriers - including AT&T - in MDU markets throughout the country.

The PCO's video programming, Internet and other services are provided to MDU residents pursuant to a right-of-entry ("ROE") agreement between the PCO and the MDU property owner or (in the case of a condominium or other common interest community) the homeowners' association. A typical ROE agreement remains in effect for a period of between five and ten years. DIRECTV requires that all ROE agreements executed by its PCO distributors be reviewed and approved by DIRECTV prior to being signed by the PCO.

The issues raised in this proceeding are of critical importance to IMCC members because the Transaction has the potential to profoundly affect PCOs' ability to deliver high-quality video programming services to MDU residents; without the ability, the PCO industry will die and competition within the MDU submarket for MVPDs will suffer.

II. Specific Concerns.

A. The viability of the PCO industry requires that there be at least two major providers of multi-channel video programming transmitted via satellite and delivered to MDU residents.

The potential effect of the Transaction on the PCO industry matters because although PCOs collectively comprise a relatively small portion of the MVPD market overall, their role is nonetheless significant if *fostering a competitive environment in all MVPD sub-markets* is a primary policy goal. Because "approximately 30 percent of Americans live in MDUs and ... this percentage is growing,"[1] MDU residents constitute a significant submarket within the MVPD market overall. Within the MDU submarket, direct broadcast satellite is one of the three major technology platforms used to deliver video programming signals to Americans residing in apartment or condominium complexes, and the DBS platform as it is currently structured relies on PCOs to deliver satellite television signals to MDU customers. It follows that notwithstanding its small scope in the MDVP market overall, the PCO industry does in fact play a critical role in ensuring customer choice for the sizable and growing MDU submarket.

Furthermore, as a matter of principle, if competition in the MVPD market overall is to be encouraged, *all* viable competitors are important regardless of their relative size. This is especially

[1] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments* ("*Exclusives Order*"), Report and Order and Further Notice of Proposed Rulemaking, MD Docket No. 07-51, Rel. Nov. 13, 2007, ¶ 8.

true at a time of aggressive consolidation among MVPDs nationally. The competitive significance of even a small market participant increases in proportion to the reduction in the number of major market participants resulting from industry consolidation. In the current environment of cable and telephone mega-mergers, Americans want, need and deserve the additional option that PCOs offer.

As indicated in the Introduction, DIRECTV is one of only two sources from which PCOs can acquire video programming content, the other source being Dish Network. Thus, from the PCO perspective, DIRECTV is one of two suppliers of an essential, vital input (video programming content) without which PCOs cannot compete. If the Transaction is approved, one of the two suppliers of essential inputs will be acquired by AT&T – a company that directly competes with PCOs for video, Internet and telephone customers across the country. It is therefore reasonable to assume that once in control over DIRECTV, AT&T will have both the ability and the incentive to marginalize or eliminate PCOs from MDU markets for the purpose of absorbing PCOs' subscriber base within its own purview.

For example, in its "Description of Transaction, Public Interest Showing and Related Demonstrations" (referred to as the "Public Interest Showing"), AT&T states that in areas where the company does not offer U-verse video services, "consumers will now have access to an integrated offering of a premier satellite video service from the same company that provides their broadband service, enabling simplified billing and better customer care."[2] In these same non-U-verse areas (as everywhere else) PCOs *also* sell an integrated offering of DIRECTV video programming (referred to herein as "DIRECTV Service") and broadband services, *and* PCOs provide integrated billing and customer care to MDU subscribers[3]. Thus, AT&T's Public Interest Showing raises the question of what will happen to PCOs that re-sell DIRECTV Service in these areas – given that PCOs compete directly with AT&T for MDU customers. PCOs are deeply concerned that the combined entity could significantly cut back or eliminate altogether the PCO's role in DIRECTV's existing model for delivering video programming signals to MDU residents for the purpose of suppressing competition.

If post-Transaction AT&T decided to eliminate or significantly burden the ability of PCOs to acquire video programming from DIRECTV and/or deliver DIRECTV Service to customers, PCOs would have only one source for television content – Dish Network. But a healthy, competitive market cannot exist where participants have only one source from which to obtain

[2] Public Interest Showing, p. 4.

[3] Although the arrangements between DIRECTV and its PCO distributors has changed from time to time over the years, under the current model, PCOs providing bulk video services direct bill the property owner and in the case of non-bulk services, the subscriber is billed by DIRECTV.

essential inputs. In order to survive as a competitive force in MDU submarkets, the PCO industry requires at least two sources for obtaining multi-channel video programming content.

B. If the Transaction is approved, post-Transaction AT&T would have the ability and the incentive to leverage DIRECTV's programming contracts to eliminate competition from PCOs in MDU markets.

As mentioned above, all PCOs acquire video programming content directly or indirectly[4] from one of two sources: Dish Network or DIRECTV. Currently, more than 50% of PCOs purchase programming from DIRECTV through programming contracts (referred to herein as the "Programming Contracts") between the PCO and DIRECTV or a DIRECTV "Master System Operator". These contracts provide the PCO with the legal right to distribute DIRECTV Service to MDU subscribers, and provide for commission payments by DIRECTV to the PCO as compensation for the PCO's delivery of DIRECTV Service to end-users residing in MDU properties. Its Programming Contract with DIRECTV is the life-blood of the PCO's business because without such a Programming Contract in effect, the PCO cannot distribute any DIRECTV Service to its customers.

While PCO Programming Contracts are negotiated at arms' length, DIRECTV is, as previously stated, one of only two sources from which a PCO may acquire video programming content. It is therefore not surprising that under a typical Programming Contract, DIRECTV retains deep and pervasive control over most aspects of the PCO's business and operations, including control over the PCO's ROE agreements, the method and manner in which DIRECTV Service is delivered to end-users and over the PCO's right and ability to sell its assets, consisting of the central signal distribution system located on MDU property and the PCO's subscriber base. DIRECTV's control over PCO operations is not in itself problematic inasmuch as DIRECTV views the PCO as a needed partner in selling DIRECTV to MDU customers. However, if the Transaction is approved, DIRECTV will fall under the control of AT&T. Because AT&T (unlike DIRECTV) competes with PCOs, AT&T is less likely to view PCOs as partners than as rivals. Consequently, it is reasonable to assume that AT&T would have the incentive to exploit control over PCOs under the Programming Contracts for the purpose of forcing its PCO rivals out of MDU markets.

[4] Many PCOs acquire proprietary Dish Network programming content indirectly from content aggregators such as Pace, KT Communications, and 4COM, Inc. PCOs acquire DIRECTV programming directly from DIRECTV.

The following paragraphs describe those specific provisions of a typical Programming Contract[5], and indicate how those provisions described above could be – *and if the Transaction is approved, are likely to be* – leveraged against PCOs to force them out of MDU markets. Again, it must be emphasized that each of the described provisions give DIRECTV direct or indirect control over the PCO's ability to earn a profit and to successfully operate in a competitive market. The fact that the Programming Contract gives DIRECTV ultimate control over a PCO's business is not problematic as long as DIRECTV views the PCO as its partner in the common endeavor of delivering DIRECTV service to MDU residents. However, *DIRECTV's control over PCOs becomes problematic – and an appropriate issue to be considered in the Commission's review of the Transaction – to the extent that DIRECTV becomes a subsidiary of a company that actively competes with PCOs, because at that point the parent company is likely to view PCOs less as partners to be supported than as rivals to be eliminated.*

1. Term. The Programming Contract remains in effect for a relatively short time period, between one and three years and automatically renews for successive one-year period unless terminated by either party. [REDACTED]

Upon expiration or termination of the Programming Contract with respect to any MDU property, the PCO immediately loses the right to provide DIRECTV Service.

2. Right to unilaterally terminate for convenience. DIRECTV reserves the right to terminate at any time the Programming Contract for convenience – meaning, without breach by the PCO.

With regard to items (1) and (2), DIRECTV's control over PCO operations is direct and obvious, because DIRECTV has the right to terminate the Programming Contract for convenience or to refuse to allow the Contract to automatically renew. Post-Transaction DIRECTV's parent company will have the ability and incentive to eliminate PCO competitors by terminating the Programming Contracts for convenience or by simply refusing to allow the Programming Contracts to automatically renew. Its Programming Contract with DIRECTV unilaterally terminated, the PCO would immediately lose its right to distribute DIRECTV Service, and would have no other

[5] In these Comments, the term "Programming Contract" refers generically to a typical PCO Programming Contract and not to any particular Programming Contract.

option than to turn to the only other available source of DBS television programming, Dish Network.

We emphasize that this option – the PCO's option to substitute Dish Network for DIRECTV – is option that exists only in the realm of theory, not in the real world, for several reasons. First and foremost, the PCO without a DIRECTV Programming Contract would immediately find itself in breach of its ROE agreements with MDU property owners because the PCO could no longer provide the video programming service it agreed to provide, *i.e.*, DIRECTV Service. Second, the PCO could not renew any of its ROE agreements with MDU properties without persuading the property owner to allow the PCO to switch its programming service from DIRECTV to Dish Network. It is exceedingly unlikely that any MDU property owner would agree to such a switch, given that AT&T could presumably step in and offer the MDU property seamless continuation of DIRECTV Service in place of the PCO. Moreover, even in the unlikely event that an MDU property owner did agree to allow the PCO to switch to Dish Network programming, the PCO would be forced to re-spend its capital to re-install or alter the on-site signal distribution system, including customer premises equipment, to accommodate the Dish Network technology platform, rendering the entire transition economically unfeasible. Stated otherwise, termination or non-renewal of PCO Programming Contracts would in effect amount to a death knell for all PCOs that distribute DIRECTV Service, which constitute more than one-half of the entire PCO industry.

3. Right to terminate based on churn rate or penetration. The Programming Contract requires that the PCO maintain a maximum average "churn rate" below a specified maximum percentage on all of the PCO's MDU properties.[6] Likewise, the Programming Contract requires that the PCO maintain a minimum average penetration rate at all of the PCO's MDU properties.[7] If the PCO's churn rate exceeds the maximum allowed rate, or if the PCO's penetration rate falls below the minimum allowed standard, and the PCO fails to bring its churn rate and/or penetration rate into compliance, the Programming Contract allows DIRECTV to impose harsh sanctions against the PCO, thus devaluing the PCO's ROE-related assets, and ultimately to terminate the Programming Contract altogether[8].

[6] "Churn rate" refers to the rate at which active subscribers to a service terminate their subscriptions during a specified time period, and is calculated by dividing the number of subscribers (at a particular MDU property or across a portfolio of MDU properties) who disconnected service during the specified time period by the number of active subscribers as of the beginning of the time period.

[7] "Penetration" refers to the percentage of total residents at a particular MDU property (or across a portfolio of MDU properties) who subscribe a service, and is calculated by dividing the aggregate number of subscribers to the service by the total number of units at the MDU property.

[8] [REDACTED]

4. Right of first refusal. [REDACTED]

With regard to item (3), DIRECTV's control over PCO operations is less direct but nonetheless real. DIRECTV has the ability to cause a PCO to lose subscribers – thereby increasing the PCO's churn rate and decreasing the PCO's penetration rate – because DIRECTV and not the PCO controls the terms and conditions governing a subscriber's access to the product being sold by the PCO, *i.e.*, DIRECTV Service. DIRECTV can affect the PCO's churn rate and its penetration rate simply by (for example) elevating the credit rating required of a new or renewing subscriber residing in an MDU property, and/or by adjusting its pricing for MDU subscribers. To the extent that DIRECTV views its PCO distributors as partners, the company has no incentive to engage in such practices. However, if DIRECTV becomes a subsidiary of a company that views PCOs not as partners but as rivals, the incentives change dramatically.

Once in control over DIRECTV, A&T *will* have the incentive to degrade the PCO's ability to compete, because, as summarized in item (4), if the distressed PCO decides to sell its ROE assets, AT&T will have the right of first refusal to purchase the assets in such a sale transaction. The Programming Contract allows post-Transaction AT&T to function as an insurmountable barrier blocking the PCO's access to the marketplace. To illustrate this point, suppose that the merged entity did in fact elevate the required credit rating for new or renewing DIRECTV subscribers residing in MDU buildings. Because fewer MDU residents would qualify for subscription to DIRECTV Service, the immediate effect of such an adjustment would be an increase in the PCO's churn rate and a corresponding decrease in the PCO's penetration rate. This result would cause an incremental devaluation of the PCO's ROE assets, but it doesn't stop there. As indicated above, if a PCO's churn rate and/or penetration rate do not meet DIRECTV's standards, the Programming Contract gives DIRECTV (now under the control of AT&T) the right to impose harsh sanctions against the PCO. As described in footnote 9, the mere threat of these harsh sanctions will cause the PCO to un-restrict its MDU properties, thus allowing a competing DIRECTV partner – specifically AT&T – to replace the PCO as the provider of DIRECTV Service to MDU residents. The end result is that the churn and penetration rate standards contained in the Programming Contract allow DIRECTV to directly or indirectly cause the devaluation of the PCO's ROE assets. Devaluation of the PCO's ROE assets would in turn incentivize the PCO to sell the devalued asset(s) in question to a third party, while simultaneously reducing the purchase price offered by potential buyers of the asset(s).

This is where item (4) comes into play. The right of first refusal provision in the Programming Contract would in effect give AT&T the right and the ability to purchase the PCO's asset(s) at a discounted price amounting to pennies on the dollar. In the scenario we are describing, the Programming Contract allows AT&T to eliminate its PCO competitors from MDU markets, and simultaneously to acquire PCO assets including both signal distribution equipment and the PCO's property specific subscriber base at fire sale prices simply by exercising DIRECTV's rights under the Programming Contract.

5. Right to terminate based on customer service levels or sales plan. [REDACTED]

DIRECTV's control over the PCO's sales plan and customer service levels can be analyzed in the same way as items (3) and (4) as described above. The Programming Contract gives DIRECTV the unilateral right to approve or disapprove a PCO's sales plan. In addition, a PCO's ability to adhere to the customer service levels required in the Programming Contract is at least partially under the control of DIRECTV, in that the PCO's ability to perform service and upgrade installations on a timely basis, and its ability to perform certain repairs, in many cases depends on DIRECTV's making needed equipment available to the PCO on a timely basis. If the PCO's sales plan is not approved, or if the PCO fails to adhere to required customer service levels, the

Programming Contract gives DIRECTV the right to impose harsh sanctions against the PCO. As described in item (4) above, the mere threat of such harsh sanctions will be enough to devalue the PCO's ROE assets, forcing the PCO to offer the assets for sale. Thus, it is plausible to assume that post-AT&T would have the incentive to leverage the sales plan and customer service level provisions of the Programming Contracts for the purpose of acquiring devalued PCO assets by means of the right of first refusal (item (4)) as described in the preceding paragraph.

6. Compensation. Under the Programming Contract, the PCO receives several types of compensation from DIRECTV, including [REDACTED]

DIRECTV exerts control over PCO operations to the extent that DIRECTV controls the compensation it pays to the PCO, and retains the right to unilaterally change both the structure and the amount of the compensation paid. *Furthermore, under DIRECTV's compensation structure, when an existing DIRECTV subscriber whose DIRECTV Service is bundled with AT&T's Internet service moves into an MDU property that is at the time of the move-in being served by a PCO, the PCO receives no compensation at all*, despite the fact that the subscriber receives the DIRECTV Service through a central signal distribution system that was built and financed by the PCO, and the PCO is required to service that DIRECTV subscriber.

If the Transaction is approved, the total number of DIRECTV subscribers will certainly increase dramatically thanks to integrated marketing of AT&T bundles offering AT&T's telephone and Internet services with DIRECTV Service. Likewise, the number of existing DIRECTV subscribers who move into MDU properties that are being served by a PCO will correspondingly increase in a dramatic fashion. Post-Transaction, AT&T will generate revenue from each of these new DIRECTV subscribers, while PCOs will bear the burden of providing DIRECTV Service by means of their central signal distribution systems, as well as customer support, without receiving any compensation whatsoever for this additional burden.

7. Third Party Beneficiary. The Programming Contract requires [REDACTED]

DIRECTV retains ultimate control over the ROE agreement between the PCO and the MDU property owner or HOA, especially when DIRECTV's third-party beneficiary status is considered in conjunction with other provisions of the Programming Contract. If the PCO's services are degraded through no fault of its own – for example due to the unavailability of proprietary DIRECTV equipment needed to complete repairs or service installations as discussed in connection with item (5) – DIRECTV retains the unilateral right to un-restrict the property, thus allowing a different provider of DIRECTV Service – specifically post-Transaction AT&T – to compete with or replace the PCO. In addition, the power to un-restrict an MDU property implies the power to radically devalue the PCO's ROE agreement because the PCO no longer has the exclusive right to provide DIRECTV Service at the property. If the PCO is forced to sell the ROE asset, the right of first refusal, together with the right to withhold consent to any proposed assignment of the ROE agreement allows AT&T to purchase the asset at a fire sale price as discussed in connection with items (3) and (4) above.

C. If the Transaction is approved, the Commission should impose conditions on the merged entity for the purpose of protecting the PCO industry.

Section B of these Comments contain a description of how DIRECTV, once under the control of AT&T, is likely to exploit certain provisions of its Programming Contracts with PCOs to damage or eliminate PCOs that compete with AT&T for customers at MDU properties, and to acquire their assets. In this section, we propose a list of conditions that are narrowly designed to avert the harms outlined in Section B. The Commission should not approve the Transaction without requiring that the combined entity adhere to the each of the conditions described below.

1. Extension of PCO Programming Contracts.

The Commission should require that the term of all existing Programming Contracts between DIRECTV and a PCO be extended for a period of ten years, and with respect to any particular MDU property subject to an ROE agreement, the Programming Contract should further extend for an additional "servicing term" expiring at the earlier to occur of expiration of the ROE agreement or five years following expiration of the ten year term. This ten-year extension is referred to herein as the "Extended Term".

2. Waiver of right to terminate for convenience.

The Commission should require that the combined entity waive the right to terminate any Programming Contract for convenience during the Extended Term.

3. Waiver of right to terminate for churn rate or penetration rate.

The Commission should require that the combined entity waive the right to terminate any Programming Contract based on the PCO's churn rate or its penetration rate during the Extended Term.

4. Waiver of right to terminate or impose harsh sanctions for customer service levels.

The Commission should require that during the Extended Term, the combined entity waive the right to terminate any Programming Contract based on the PCO's failure to comply with customer service level standards contained in the Programming Contract, insofar as that failure is directly or indirectly caused by actions or omissions of the combined entity.

5. Waiver of right of first refusal.

The Commission should require that the combined entity waive the right of first refusal with regard to any sale of PCO assets during the Extended Term.

6. Compensation.

The Commission should require that the combined entity waive its right to alter the compensation structure and amount paid to PCOs during the Extended Term. In addition, during the Extended Term the combined entity should be required to pay compensation (including both the one-time activation fee for new DIRECTV subscribers and the recurring commission as described in item (6) above) to the PCO for each existing DIRECTV subscriber who moves into an MDU property and receives the DIRECTV Service by means of the PCO's central signal distribution system.

7. Third-Party beneficiary.

The Commission should require that during the Extended Term the combined entity waive its rights as a third-party beneficiary of any PCO ROE agreement that is subject to a Programming Contract, including the right to withhold consent to an assignment of the ROE agreement and the right to replace the PCO as the provider of DIRECTV Service if the PCO breaches the ROE agreement.

8. Credit rating qualification for MDU customers.

The Commission should require that during the Extended Term the combined entity's credit rating requirements for new and renewing subscribers residing in MDU properties not deviate from its credit rating requirements for new and renewing subscribers residing in single-family homes.